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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91176901
Party	Plaintiff Bodyonics, Ltd.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Bodyonics, Ltd. Opposer, v. Jeffrey Lee Kaplan and Ilie Ioncescu, Applicants.	OPPOSER'S REPLY TO OPPOSITION TO MOTION FOR SUMMARY JUDGMENT Opposition No. 91176901

Applicant' Opposition to Opposer's Motion for Summary Judgment on Opposer's Motion based upon likelihood of confusion is merely a rehash of what Applicant has provided before.

Curiously, Applicant states that Opposer's Supplemental Motion should be denied because the deadline passed for submission of any motions. Opposer is unaware of the Board having set a cutoff date for filing with respect to the Motions for Summary Judgment Furthermore, if Applicant is arguing that Opposer's Supplement Motion for Summary Judgment is untimely, how can Opposer's Supplemental Motion for Judgment be considered timely? Once again the Board and Opposer are burdened with the inexperience and time wasting of Applicant's lack of familiarity with the litigation process.

Applicant argues that its product is not a pill or liquid form and there is not a dietary supplement. Applicant, of course, offers not basis for this conclusion. Indeed, this conclusion is contradicted by the evidence submitted by Opposer which Applicant does not challenge. Furthermore, it is clear that Applicant has no understanding of the concept of related or closely related goods. Applicant's argument with respect to products that it allegedly

found on the Internet BEFORE Opposer secured the abandonment of these products offers nothing to Applicant. Applicant does not provide any information that these products are available for sale and purchase from the sponsor of the products (the fact that they may be available on a odd website is not proof of use by the owner of the alleged trademark) as of the time that it filed its documents. This shows exactly why Internet publications are considered unreliable in many circumstances and must the subject of a declaration and NOT a Notice of Reliance.

Applicant appears to have not read Opposer's moving papers with regard to likelihood of confusion. Since Applicant's application is based on intent to use and it has not used it's mark, there is no way that Opposer could show actual confusion or actual damage. Once again, it is clear that Applicant has no understanding of basic trademark law.

Again, Applicant states that because an examiner approved its application for publication that is proof that no one could ever oppose the mark. This is an argument that has not merit. As to the examiner not finding Applicant's mark to be generic or descriptive, it is clear that Applicant withheld from the examiner that inhaled products are generically referred to as "poppers" as it admitted in its answers to discovery. Had the Applicant filed a truthful application, it would have been rejected by the examiner outright and would have never been approved for publication for Opposition.

The fact that disclaimer of a descriptive word does not automatically mean a compound word cannot function as a trademark

is a true statement. However, here it is irrelevant. Since Applicant's mark is ENERGY POPPERS, and the entire mark is descriptive/generic, it cannot function as a trademark. In addition, this argument has no bearing on the likelihood of confusion analysis.

Applicant continues to refer to Opposer's pending application for MUSCLE POPPERS which disclaims "poppers". That mark incorporates applicant's incontestable trademark POPPERS. The existence of this application with the "muscle" disclaimer is irrelevant here.

Finally, Applicant argues that Registrant has abandoned its trademark and refers to a webpage and again talks about acquiescence. There is no evidence whatsoever of abandonment and there is no evidence of acquiescence. These issues have been expansively briefed elsewhere.

There being no effective opposition to Opposer's Motion for Summary Judgment based upon likelihood of confusion, the
in position to grant either or both of Opposer's Motions for Summary Judgment.

Dated: August 27, 2007

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I certify that the foregoing is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to Ilie Ioncescu and Jeffrey Kaplan at P.O. Box 11106, Ft. Lauderdale, FL 33339 on August 27, 2007.

Jay H. Geller